

Mrs. Gocul B. Naik,
wife of Bhisso Naik,
(since deceased),
through her legal representatives:

1. Mr. Chandrakant B. Naik,
son of Bhisso Naik,
major of age,
resident of Tarvalem,
Shiroda.
2. Mr. Ratnakar B. Naik,
son of Bhisso Naik,
major of age,
resident of Tarvalem,
Shiroda.
3. Mrs. Proful Naik,
wife of Chandrakant Bhisso Naik,
major of age, resident of
Tarvalem, Shiroda.
4. Mrs. Prita Ratnakar Naik,
wife of Ratnakar Bhisso Naik,
major of age,
daughter-in-law of deceased.

... Appellants/
Original Defendants.

VERSUS

1. Mr. Sonso Chudu Naik,
son of Chudu Naik,
major of age, agriculturist,
resident of Tarvalem,
Shiroda.
2. Mrs. Laxmi Sonso Naik,
wife of Sonso Chdu Naik,
major of age, housewife,
resident of Tarvalem,
Shiroda.

... Respondents/
Original Plaintiffs.

Mr. S.D. Lotlikar, Senior Advocate with Ms. S. Naik,
Advocate for the Appellants.

Mr. M.S. Usgaonkar, Senior Advocate with Mr. Sudesh
Usgaonkar, Advocate for the Respondent No.1.

CORAM: N.A. BRITTO, J.

DATE FOR RESERVING THE JUDGMENT: 8.7.2004
DATE FOR PRONOUNCING THE JUDGMENT:16.7.2004

J U D G M E N T:

This Second Appeal is by the defendants in
R.C.S. No. 38/1979/A.

2. The dispute between the parties is regarding a property known as "Gorbatta Parte" or "Gorbatta Tocximo" having Land Registration No. 6253 and a house situated therein, admittedly occupied by the defendants.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the suit. As far as the property is concerned, there is no dispute that once upon a time it belonged to the common ancestor of the plaintiffs and the defendants by name Ragu Appa and it came to be divided by virtue of a Deed dated 27th November, 1894 and as per the said Deed each of the belowmentioned persons came to have 1/3 share to the said property :-

- (a) Appa Ragu Naik and wife Savitri;
- (b) Budo Chadu Naik alias Bodko
and wife Laxmi;
- (c) Yessodi Naikini alias Onay,
widow of Bisso Mosno Naik alias

Bombo.

4. The plaintiff No.1 is the paternal grandson of the said Bodko/Laxmi while defendant No.1 is the great grandson of the said Yessodi/Bisso.

5. The plaintiffs filed the suit for eviction of the defendants from the suit house alleging that the suit house was an old structure belonging to the family of the plaintiffs which was allowed for the residence of the ancestors of the defendants and which house was abandoned by the family of the defendants about the year 1925 (50 years prior to 1975). The plaintiffs pleaded that somewhere in the month of November, 1975 the defendant No.1 repaired the suit house without the permission of the plaintiffs and subsequently in the year 1977 started occupying the same and the plaintiffs objected to the said illegal act of the defendant No.1 and even lodged complaint to the Village Panchayat of Shiroda and the defendants in the year 1977 extended the suit house without the consent or permission of the plaintiffs. The case of the plaintiffs was that the defendants had no right whatsoever to extend the said house nor the defendants have any right to occupy the same and the defendants are mere trespassers illegally occupying the said house with its extensions and therefore the plaintiffs were entitled to evict the

defendants from the said house and from the extension made to it.

6. As far as the suit property was concerned, it was the case of the plaintiffs that the suit property was partitioned by metes and bounds and the said Yessodi was enjoying the land equivalent to 1/3 share and forming the eastern strip of the property and the other co-owners were enjoying the remaining land forming the western portion equivalent to 2/3 share approximately and that the 1/3 share which was being enjoyed by the said Yessodi was presently surveyed under Nos.399/7 and 394/14 and the remaining 2/3 enjoyed by Appa Ragu Naik and the said Bodko was surveyed under Nos.399/6 and 394/8.

7. The plaintiffs stated that the said Appa and his wife expired about 70 years back without any male issues and their shares were enjoyed by his brother the said Bodko alias Budo who is paternal grandfather of plaintiff No.1 and the said Budo and his wife Laximi died sometime about 55 years back and the share of Appa and the said Bodko was then enjoyed by Bodko's only son by name Chadu who is the father of the plaintiff No.1. The plaintiffs stated that the said Chadu and his wife Anandi died in the year 1973 and 1978 respectively and in the Inventory proceedings initiated after their

death, 2/3 share of the said property originally belonging to the said Apa Ragu Naik and the said Bodko was allotted to the plaintiffs by Order dated 16.7.1978. The plaintiffs further stated that 1/3 share of the said Yessodi was sold by her son Moshno B. Naik and his wife by deed dated 16.3.1907 to one Joao Avelino Rodrigues of Shiroda and this 1/3 part was subsequently separately registered under Inscription No.11631. The plaintiffs stated that the suit house is situated in Survey No.394/8 wherein there is also a residential house of the plaintiffs and a temple raised by the plaintiffs.

8. As far as the suit house is concerned, it was the case of the defendants, that they are residing in their own ancestral house from times immemorial in which defendant No.1 was born and brought up and has been living with his family and prior to that all his ancestors lived and occupied and maintained the said house as their own to which the plaintiffs had no right, title or interest of whatsoever nature. The defendants stated that the said temple was constructed by the plaintiff No.1 about 7 to 8 years back with prior consent of defendant No.1 and other heirs and others interested in the said property being the husband of Smt. Xanu Surya Naik and Maghu Babuso Naik. The defendants denied that the suit house belonged to

the plaintiffs and further stated that they were residing therein from the time of their ancestors as a matter of right and the same being their own have been regularly repairing and maintaining the same exclusively at their own cost. As far as the property was concerned the defendants stated that the said Appa Ragu Naik, Bodko Chadu Naik and Bhiso Moshno Naik were cousin brothers and the said Yessodi was the wife of the said Bhiso and all of them during their lifetime enjoyed the said property in common without any specific division or partition of the same by metes and bounds. The defendants stated that the said Yesodi Naik never enjoyed her share separately nor did the said Appa Ragu Naik and Bodko Chadu Naik as falsely alleged by the plaintiffs. The defendants also denied that the survey numbers corresponded to the alleged properties or the parts mentioned by the plaintiffs. The defendants stated that the entire property as on date stood as one unit and the same has been possessed and enjoyed exclusively by the ancestors of the defendants in common and after their death the same property in similar circumstances is being possessed and enjoyed by the father of the defendants without any specification of share and till now it remains as ancestral undivided common property.

9. The defendants stated that the Inventory

proceedings could not have taken place in defiance of the rights of the defendants and those of Smt. Xanu Surya Naik and Smt. Mogu Babuso Naik and therefore the said proceedings were null and void for which the defendants would seek necessary reliefs.

10. The defendants filed a counter claim inter alia praying that the Inventory proceedings No.44/77 be declared as null and void.

11. The learned Trial Court by its judgment dated 11.1.88 came to the conclusion that the defendants had proved that they had 1/3 right to the suit property and that they were the co-owners in possession of the suit property. The learned Trial Court also came to the conclusion that the plaintiffs were not entitled to evict the defendants from the suit house and that the defendants were entitled for the relief claimed by them in the counter claim and consequently proceeded to dismiss the suit filed by the plaintiffs and allow the counter claim with costs.

12. The first appellate Court by its judgment dated 29.8.1998 came to the conclusion that the defendants were not in possession of the suit house prior to 1975 and that the defendants had not proved their title in respect of the suit property or the suit house and

therefore they had no tittle of title to remain in possession. The learned first appellate Court further held that the plaintiffs had proved that they were the owners of 1/3 part of the property and were in possession of the remaining 1/3 share which originally belonged to Appa Naik and his wife and since the plaintiffs were in long, anterior and peaceful possession were entitled to maintain their possession against all except the true owner or against the person who has (sic no) better title. The learned first appellate court also observed that the possession of the defendants was unlawful and hence the same could not be protected and therefore proceeded to decree the suit and dismissed the counter claim.

13. This Court had admitted this appeal by Order dated 19.2.1999 on questions (b), (c), (d), (e) and (f) as framed by the defendants in their memorandum of appeal. But at the time of arguments, it has been submitted on behalf of the said defendants that answers to questions (e) and (f) would be sufficient to decide the present Second Appeal. The said questions read as follows :-

" (e) Whether an admission can be used
against a party making it only
after it is confronted with the

said admission and/or cross examination in respect of the said admission.

(f) Whether the finding recorded by the First Appellate Court, that the possession of the Appellants in respect of the suit house was unlawful, is perverse being without any basis in the evidence. "

I therefore proceed to answer question (f) first.

14. It is well settled that normally concurrent findings of fact cannot be interfered with in Second Appeal, as stated by the Supreme Court in the case of **Sheel Chand v. Prakash Chand** (1998) 6 S.C.C. 683 but perversity, illegality or irregularity with the concurrent findings can be dealt with in Second Appeal. In the case of **Kochukakkada Aboobacker (dead) by L.Rs. and others v. Attah Kasim and others** (1996) 7 S.C.C. 389 the Supreme Court has held that where the Trial court and the first appellate court did not consider relevant documents in proper perspective and effect of those documents on the rights of the parties, the High

Court is entitled to reconsider the evidence by drawing inferences from the admitted documents.

15. In the case at hand the learned Trial Court came to the conclusion, upon consideration of the documents, produced by the defendants, that the defendants had established their right to the suit house being exclusive owners thereof. However, the first appellate court came to the contrary conclusion that the defendants had not proved title to the suit house nor had proved that they had tittle of title to remain in possession. The learned first appellate court, in my opinion, brushed aside the documents produced by the defendants which had totally rebutted the case pleaded by the plaintiffs or sought to be proved by them.

16. The plaintiffs had pleaded that the suit house belonged to the family of the plaintiffs which was allowed to be used for the residence of the ancestors of the defendants, but had not specified as to which ancestor of the plaintiffs had allowed which ancestor of the defendants to reside therein. P.W.1 Sonso who had stepped into the witness box to substantiate the case of the plaintiffs, did not even corroborate the averments made in the plaint, but on the contrary, had stated that the defendants came in the year 1969 and

scolded his children who were there and thereafter in the year 1977 (and not in the year 1975 as pleaded) came and constructed an extension, and, probably it is then that the defendants started occupying the suit house. The plaintiffs had not pleaded nor it was the case of P.W.1 Sonso in his evidence that the plaintiffs were ever in possession of the suit house after the defendants allegedly abandoned the same in the year 1925 or thereabout. If some persons close their house belonging to them and go to a neighbouring town either to pursue their studies or in search of jobs, they certainly do not abandon their house. In the absence of any claim for possession having been made by the plaintiffs to the suit house, the learned first appellate court was wholly unjustified to accept the statements of P.W.2 Francisco to the effect that the plaintiffs were storing palm leaves in the suit house or for that matter the statement of P.W.3 Jose to the effect that the plaintiffs used to store firewood in the same. Apart from other oral evidence produced by the defendants, the defendants had produced Form No.III at Exh.PW.1/A3 which showed that the suit house was shown in the name of Bisso Ragu Naik. The learned first appellate court rightly observed that the said survey records showed that the defendants were in possession of the suit house considering the fact that the survey was conducted in 70s. In fact, it is common

knowledge now that survey was conducted in early 70s. The learned first appellate court rightly observed that the presumption was that the defendants were in possession of the house when the survey was conducted, but the learned first appellate court failed to note that this possession had entirely demolished the case of the plaintiffs that the defendants had ever abandoned the suit house and on the contrary showed that they had continued to be in possession of the same. The defendants had also produced panchayat tax receipts particularly for the year 1974 onwards. The learned appellate court observed that the said receipts cannot be proof of title. However, it is to be noted that the defendants had categorically stated that they have been paying the house tax to the Panchayat right from its inception while the plaintiffs had conceded that they had never paid the house tax in respect of the suit house. The said house tax receipts per se might have not been proof good enough in support of the defendants' title to the suit house, but certainly they were more than sufficient to corroborate the claim made by the defendants and to rebut the claim of the plaintiffs. The defendants had also produced a legal notice sent by P.W.1 Sonso dated 24.5.1977. The learned first appellate court observed that the defendants did not confront P.W.1 Sonso with the said notice nor proved that what was stated in the said

notice was as per the instructions of the plaintiffs. I fail to understand as to how the learned first appellate court could have made the said observations when P.W.1 had clearly admitted in his cross-examination that he had sent a legal notice to the defendant No.1 through his Advocate Shri Menezes and not only that, whatever was stated in the said notice was correctly stated. It is only after it was brought to his notice that in the said notice dated 24.5.77 it was stated that defendant no.1 was residing as a mundcar, that P.W.1 Sonso tried to wriggle out from the situation and stated that although the notice was sent as per his instructions, he did not tell his Advocate that the defendant No.1 was staying as mundcar. It is sought to be contended on behalf of the plaintiffs that it is not the case of the defendants that they are residing in the suit house as mundcars. It may not be their case, but the fact remains that the said statement made on behalf of the plaintiffs in the said notice was sufficient to destroy the very case pleaded by the plaintiffs and sought to be proved on their behalf. It was pertinent to note that the plaintiffs in the said notice did not even call upon the defendants to vacate the suit house. The said documents produced on behalf of the defendants were more than sufficient to support the claim of the defendants as against the claim made by the plaintiffs

that it is the defendants who were in possession and in occupation of the suit house as their own. In other words, the defendants had sufficiently proved that they were in lawful possession of the suit house from the time of their ancestors. In fact a belated attempt was made by P.W.1 Sonso to say that the suit house was built by his grandfather without pleading this fact in the plaint which statement of his was not otherwise supported by any of the witnesses of the plaintiffs or any document produced by the plaintiffs. P.W.1 Sonso even admitted in his cross-examination that he had told his Advocate that defendant No.1 was coming to the suit house once in a year and staying there, thereby demolishing the entire case pleaded by him and sought to be proved by him, The findings of the learned first appellate court that the defendants started residing in the suit house only from the year 1975 was wholly unjustified. In fact P.W.1 Sonso had stated in his evidence that the defendants had started residing in the suit house in the year 1977 and not in the year 1975 as was otherwise pleaded by the plaintiffs. The oral and documentary evidence produced by the defendants clearly showed that the Defendants were residing lawfully in their ancestral house belonging to them.

17. Having realised that the defendants have been

residing lawfully in their own ancestral house, Mr. Usgaoncar, the learned senior counsel of the plaintiffs submits that the suit house has got to be considered as an integral part of the property and cannot be divested from it. Shri Usgaoncar next submits that the defendants would have been able to resist their eviction only in case they had claimed and proved to be mundcars or tenants or by way of adverse possession and having not done the same, and the plaintiffs having proved that they are exclusive owners of the suit property, eviction ought to follow. Shri Usgaoncar has referred to Section 3(26) of the General Clauses Act 1897 which defines "immovable property" so as to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. Shri Usgaoncar has further submitted that the suit house had no distinct identity apart from the property in which it is situated and once it is held proved that the property belonged to the plaintiffs, a decree of eviction from the suit house should follow. Shri Usgaoncar has also placed reliance on the case of **Indira v. Arumugam and another** (A.I.R. 1999 S.C., 1549) wherein the Supreme Court has stated that the plaintiffs could not be non-suited unless the defendant proves adverse possession for prescriptive period. The said observations were made in connection with Art.65 of the Limitation Act, 1963. Shri

Usgaoncar has also referred to Art.375(1) of the Civil Code, 1860 which reads as follows :-

" Immovables by operation of law :-

(1) The produce and integral parts of the land and the integral parts of buildings, which cannot be separated without detriment to the beneficial enjoyment which they offer, except when they are separated by the very owner of the property. "

18. I do not think that it is necessary to deal with the above submissions of Shri Usgaoncar, the learned senior counsel, in view of the findings given by the learned first appellate court regarding the dispute as far as the ownership of the property is concerned, which findings I have no option but to endorse though I am of the view that separate ownership of building and the land on which it is situated is possible and permissible. The defendants did claim that they are co-owners of the entire property "Gorbata" which, as already stated, admittedly belonged to Appa Ragu Naik/Savitri, Budo alias Bodko Chadu Naik/Laxmi and Yessodi alias Onay Naik/Bhiso alias Bombo Mosno Naik. The learned first appellate court upon consideration of the documentary evidence produced by the plaintiffs has rightly concluded that (1) the

property was partitioned amongst original owners by partition deed dated 27.11.1894 vide Exh.PW1/A and (2) by deed dated 16.3.1907 viide Exh.PW1/A2 1/3 share of Yessodi/Bhisso was sold to Joao Rodrigues, the grandfather of PW.2 Francisco which was separately registered under No.11631 which fact was confirmed by P.W.2 Francisco.

19. The plaintiffs had clearly pleaded that the shares of Yessodi/Bhisso was 1/3 forming the eastern strip of the property. The plaintiffs had further pleaded that the said share of 1/3 of Yesodi/Bhisso was presently surveyed under Nos.397/7 and 394/14 of village Shiroda and the remaining 2/3 share of the said Appa/Savitri and Bodko/Laxmi which were being enjoyed by the said Appa and Bodko were surveyed under Nos.399/6 and 399/8. P.W.1 Sonso in his evidence also stated that the property enjoyed by Bodko and Appa was surveyed under Nos.394/8 and 399/6 and not only that even produced the survey records showing the name of plaintiff no.1 in the occupants column in respect of the said two survey numbers. The said position was not contested by the defendants. Thhe first appellate Court has rightly concluded that the evidence on record, more particularly the Land Registration Certificate (Exh.PW.1/A2) and the evidence of P.W.2 Francisco was sufficient to prove that the son of the

said Yessodi had sold their 1/3 share to Joao Rodrigues and therefore the defendants could not claim any right or title to 1/3 share of the said Yessodi/Bhiso. It was contended on behalf of the defendants, as far as the partition deed dated 27.11.1894 (reflected in Exh.PW.1/A) was concerned, that it was not in fact a deed of partition, but a deed executed only for the purpose of registration of the property which was otherwise not registered. The said deed shows that it was executed for the purpose of possessing their respective shares and for paying the corresponding lease rent and therefore the submission made on behalf of the defendants cannot be accepted. Moreover, it can be seen that what was then divided was subsequently surveyed and particularly as far as 1/3 of the said Yesodi/Bhiso was concerned under Survey Nos.399/7 and 394/14 and the remaining 2/3 of Appa/ Savitri and Bodko/Laximi were surveyed under Nos.399/6 and 394/8. It was not the case of the plaintiffs that the said Appa/Savitri had no heirs at all or upon their death they had inherited 1/3 portion belonging to them. The case of the plaintiffs was that the said Appa/Savitri did not have any male issues and, on the other hand, the defendants had shown that the said Appa and Savitri had two daughters who were married namely Mogu B. Naik and Tulsi Naik. It is therefore obvious that as far as 1/3 share of the said Appa/Savitri was concerned,

neither the plaintiffs nor the defendants could have inherited the same. That apart, it was not ever the case of the plaintiffs that they had become owners of the said 1/3 portion belonging to the said Appa/Savitri. It was only the case of the plaintiffs that after the death of the said Appa/Savitri their share was being enjoyed by Chadu, the father of the plaintiff No.1 and after the death of the said Chadu and his wife, it is being enjoyed by the plaintiffs. In other words, the plaintiffs never claimed nor could they claim that they have become the owners of the 1/3 share of the said Appa/Savitri. They only claim possession of the same. Both the plaintiffs have not proved where exactly the house occupied by the plaintiffs or for that matter the house (suit house) occupied by the defendants is situated i.e. whether the said house is situated in the said 1/3 share belonging to Appa/Savitri or Bodko/Laxmi. The plaintiffs therefore cannot claim to be the exclusive owners of the suit property which is now surveyed under Nos.399/6 and 394/8 representing 1/3 share each of the said Appa/Savitri and Bodko/Laxmi in which the suit house owned and possessed by the defendants is situated. Similarly, the defendants have also not claimed to be the successors of Appa Naik. On the contrary, the defendants have stated that the said Appa Naik had two daughters by name Smt. Mogu Babusso Naik

and Smt. Surya Naik.

20. Since the plaintiffs had failed to prove that they are the exclusive owners of the suit property surveyed under Nos.399/6 and 394/8 and the defendants had proved that they were lawfully residing in the ancestral house (suit house) belonging to them, the plaintiffs were not entitled to seek the eviction of the defendants. In this view of the matter the suit filed by the plaintiffs ought to have been dismissed. Since the defendants did not claim any right from the said Appa/Savitri to inherit their share in the said 1/3 of the suit property, I am of the opinion, that their counter claim was rightly rejected by the first appellate court.

21. That takes me to the the question (e) and last limb of the controversy and that is regarding the admission made by P.W.1 Sonso in C.C. No. 393/68 filed by the State against Chandru V. Naik and others. In the said case P.W.1 Sonso admitted in the course of cross-examination that "Bhiso is my cousin brother, he has a share in the property. Gorbata is divided in three parts and we have two parts and Bhiso has one part".

22. The learned first appellate court relying on

the case of **Sita Ram Bhau Patil v. Ramchandra Nago Patil (dead) by L.Rs. and another** (A.I.R. 1977 S.C. 1712) concluded that the learned trial Court had failed to consider that P.W.1 Sonso was not given opportunity to tender his explanation to clear the point of ambiguity or dispute and therefore the said admission in the statement could not be accepted. In fact, the learned first appellate court observed that P.W.1 Sonso was not confronted with the said statement nor was cross-examined on that aspect as the said document was produced by the defendants after the evidence of the evidence of the plaintiffs was completed.

23. The first appellate court observed that the said statement could not be treated as admission because it did not indicate in clear terms that the plaintiffs had admitted that the defendants had the right to two parts which were claimed by the plaintiffs. In my opinion the said observations are not quite correct. Likewise, the learned first appellate court observed that it could not be ascertained whether the plaintiffs had made reference to Bhiso Naik who was the husband of the late Yesodi or to the defendant No.1 whose name was also Bhiso Naik. It was obvious that P.W.1 Sonso was referring to defendant No.1 Bhiso and not to his great grandfather. If it was otherwise, he would have stated so. The

learned first appellate court also observed that the defendants had not produced the entire statement of the witness on record. In fact, the entire statement was placed on record by the defendants and in case the entire statement was not placed on record by the defendants, it was certainly for the plaintiffs to have placed the remaining part of the same or at least bring that fact to the notice of the first appellate court. The first appellate court therefore proceeded to hold that the said statement (Exh.DW.1/D) could not be considered as an admission.

24. On behalf of the defendants it is contended that an admission can be proved and acted upon without the same being brought to the notice of the person in his cross-examination. Both the parties have referred to a number of decided cases to which I will make a brief reference.

25. In the case of **Bharat Singh and others v. Mst. Bhagirathi** (A.I.R. 1966 S.C. 405) the Hon'ble Supreme Court has observed that admissions must be clear if they are to be used against the person making them. They are substantive evidence by themselves in view of Ss.17 and 21 of the Evidence Act, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence

irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under S. 145 of the Evidence Act is quite different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and only serves the purpose of throwing doubt on the veracity of the witness. Weight to be attached to an admission made by a party is a matter different from its use as admissible evidence.

26. In the case of **Biswanath Prasad and others v. Dwarka Prasad and others** (A.I.R. 1974 S.C. 117) the Supreme Court observed that " what weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence ".

27. In the case of **Union of India v. Moksh Builders and Financiers Ltd. and others etc.** (A.I.R. 1977 S.C. 409), the Supreme Court following its earlier decision in the case of **Bharat Singh v. Bhagirathi** (supra), observed that an admission is substantive evidence of the fact admitted and that

admissions duly proved are "admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions."

28. In the case of **Sita Ram Bhau Patil v. Ramchandra Nago Patil (dead) by L.Rs. and another** (A.I.R. 1977 S.C. 1712) on which reliance was placed by the learned first appellate court, the Supreme Court observed that mere proof of admission after the person whose admission it is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him.

29. I do not propose to refer to the decisions in the case of **Chiranjilal and another v. Bhagwan Das and others** (A.I.R. 1991 Delhi, 325) and **Maimuna Bibi and another v. Rasool Mian and others** (A.I.R. 1991 Patna, 203) being decisions of learned Single Judges of those High Courts who have not taken into account the law laid down by the Hon'ble Supreme Court in the case of **Sita Ram v. Ramchandra** (supra) and who otherwise held that an admission made by a party to a suit is admissible against the party proprio vigore in order to make such admission admissible in evidence.

30. The Hon'ble Supreme Court in the case of **Sita Ram v. Ramchandra** did take note of its earlier decision in the case of **Bharat Singh** (supra) and only thereafter that it held that:-

" The provisions in the Indian Evidence Act that 'admission is not conclusive proof' are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. ... The general principle is that before any person is to be faced with any statement he should be given an opportunity to see that statement and to answer the same. Therefore, a mere proof of admission, after the person whose admission it is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against

him. "

31. In the case at hand the defendants had produced the said statement of P.W.1 Sonso made in the said criminal case after the plaintiffs had closed their evidence. It is true that the decisions in the case of *Bharat Singh v. Bagirathi* (supra) as well as *Sita Ram v. Ramchandra* (supra) each were rendered by three Judges of the Hon'ble Supreme Court. Since the decision in the case of *Sita Ram v. Ramchandra* is the last word of the Hon'ble Supreme Court on the subject or in other words a later decision of equal number of Judges, it is the decision in the case of *Sita Ram* (supra) which needs and is required to be followed. Therefore, the learned First Appellate Court was justified in not relying on the said admission because P.W.1 Sonso was not cross-examined with reference to it. That apart and as already stated an admission is not conclusive proof of the matter admitted and what weight is to be given will depend upon the facts of each case. As stated by the Supreme Court in the case of **Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and others** (A.I.R. 1960 S.C. 100) an admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. There could be no doubt that the plaintiff no.1 and defendant no.1 might have been cousins, but

certainly not first cousins or cousin brothers as commonly known, since whether the parties are aware or not, they all claimed the property through a common ancestor, namely the said Ragu Appa whose name is mentioned on Exh.PW.1/A. The statement of P.W.1 Sonso in the said statement (Exh.DW.1/D) has been proved to be erroneous by the plaintiffs by producing overwhelming evidence that 1/3 share of the said Yesodi and Bhiso was sold by their cousin to the grandfather of P.W.2 Francisco and which portion was subsequently surveyed under Nos.399/7 and 394/14.

32. In the circumstances, therefore, the learned first appellate court was wholly justified in not considering the said admission of P.W.1 Sonso in the said deposition in the criminal case.

33. In view of the above discussion the appeal deserves to succeed and consequently the suit of the plaintiffs for eviction of the defendants from the suit house is hereby dismissed as the plaintiffs have failed to prove either that they are the exclusive owners of the suit property surveyed now under Nos.399/6 and 394/8 representing 2/3 share of the said Appa and Savitri and the said Bodko and Laxmi, or for that matter they are the owners of the suit house which the defendants have succeeded to prove was the ancestral

house of the defendants in which they have been residing lawfully. The learned First Appellate Court was justified in dismissing the counter claim of the defendants. Considering the facts, there will be no order as to costs.

sl.

N.A. BRITTO, J.